(4)

No. 00-556

IN THE
Supreme Court of the United States

KARLA PIERCE,
in her official capacity as,
Secretary, Kansas Department of Revenue,
Petitioner,

v.

SAC AND FOX NATION OF MISSOURI,
IOWA TRIBE OF KANSAS AND NEBRASKA, AND
THE KICKAPOO TRIBE OF INDIANS, OF THE
KICKAPOO RESERVATION IN KANSAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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6 pp

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1362, a general jurisdictional statute for federal suits brought by Indian Tribes, abrogates the States' Eleventh Amendment immunity?

2. Whether an Indian Tribe has standing to challenge a state tax when the legal incidence of the tax does not fall on the Tribe or its members, and the Tribe has no responsibility for administering or collecting the tax?

3. Whether the *Ex Parte Young* doctrine applies when an Indian Tribe challenges a general state tax?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

REPLY 1

CONCLUSION 2

TABLE OF AUTHORITIES

Cases **Pages**

Blatchford v. Native Vill. of Noatak,
501 U.S. 775 (1991) 1
Carter v. Montana Dep't of Revenue,
274 Mont. 33, 905 P.2d 1102 (1995), *cert. denied*,
517 U.S. 1188 (1996) 2
Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 1
Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 1
Ex Parte Young, 209 U.S. 123 (1908) 1

Statutes

Kan. Stat. Ann. § 79-3408(a) 1
Kan. Stat. Ann. § 79-3408(c) 1

REPLY BRIEF FOR PETITIONER

Petitioner respectfully replies to three points in Respondents' brief in opposition ("Opp.").

1. *First*. There is a fundamental difference, which this Court long has recognized and continues to recognize, between abrogating a State's Eleventh Amendment immunity and permitting *Ex Parte Young* suits for prospective, injunctive relief against individual state officials. Respondents attempt to minimize the Tenth Circuit's Eleventh Amendment holding in this case by arguing that this Court long has permitted suits by tribes seeking injunctive relief against state taxes. Opp. 1-10, and n.1. While that assertion is true insofar as it goes, what is incontestable and what respondents do not acknowledge is that such suits are not permitted directly against the States themselves in federal court, because of the States' constitutional immunity. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991).

The Tenth Circuit in this case, in contrast, expressly held that tribal suits to challenge state taxes are permitted directly against the States in federal court. Thus, in the Tenth Circuit, there is no longer any reason for a tribe to rely on *Ex Parte Young*, 209 U.S. 123 (1908), to bring such a suit, nor to name a state official rather than the State itself.

2. *Second*. The respondents mischaracterize an important, undisputed fact in this case when they assert that Kansas has attempted to impose a motor fuels tax "on retail fuel sales by Indian Tribes on their Tribal lands located within the State." Opp. 8. As clearly recognized by both courts below, the Kansas motor fuels tax at issue is imposed on *distributors* who make sales to retailers. Kan. Stat. Ann. §§ 79-3408(a) and (c). The tax is not imposed on any *retailer*, much less tribal retailers, nor is it imposed on *any retail sales*.

3. *Third*. Respondents labor to distinguish the Montana Supreme Court's decision in *Carter v. Montana Department of Revenue*, 274 Mont. 33, 905 P.2d 1102 (1995), *cert. denied*, 517 U.S. 1188 (1996), on the issue of standing. *See Opp.* 10-14. Ultimately, however, respondents offer no distinction on the law, and indeed do not apparently disagree that the *Carter* court rejected the reasoning on which the respondents and the Tenth Circuit in this case relied to justify standing. Instead, respondents seek only to distinguish the case factually in ways that have no legal significance.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant this petition for a writ of *certiorari*.

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Respectfully submitted,

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